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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 32

JAMES R. HOFFA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CRIMINAL COURTS BAR ASSOCIATION
(OF LOS ANGELES COUNTY),

Amicus Curiae.

Brief In Support Of Petition For Rehearing On Behalf Of James R. Hoffa By Criminal Courts Bar Association Of Los Angeles County, By Its Attorney Morris Lavine, Esq.

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(of Los Angeles County)

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Comes now Criminal Courts Bar Association of Los Angeles County and respectfully petitions this Honorable Court for leave to file its brief amicus curiae on a petition for rehearing of the Court's opinion in the above entitled case. There is no specific rule granting or forbidding such a petition for rehearing. The Solicitor General joined in granting leave to file a brief in the case itself but has not joined in our request for rehearing petition.

Our petition is based upon our desire to present the lawyers' views and reaction to the Court's decision in this

case. We filed a brief amicus curiae in connection with the contentions made on the limited ground on which certiorari was granted and the Chief Justice agreed with views we expressed therein. We ask the Court to re-examine his views, and ours also, expressed in our earlier brief.

We feel that the issues rise above the individuals involved and involve the fair administration of justice in the United States. For that reason, we believe that the Court should grant a rehearing, not only in respect to matters set forth in its majority opinion but under the Court's supervisory power over criminal justice in respect to the entire case and the main issues of fair trial, of the sufficiency of evidence, of unjust conviction and other points raised which were and are herein involved.

The grounds of rehearing on the specific issues involved are that in the opinion rendered by the majority of the Court, the Court misconstrued the place of the informer in the fair administration of justice in the United States and under the American idea of fair play under the Fifth Amendment to the Constitution, and the weight and credibility that should be given to his testimony in an American court.

As lawyers, we are now baffled as to what we must do to protect not only our clients but ourselves. Heretofore, the Court has said that placing an electronic bug under our carpet or in our eaves or in our cocktail glasses while we are preparing our defenses and seeking the free expression of our client with respect to the criminal cases which we are called to defend violates the Fourth Amendment to the Constitution of the United States and is an

invasion of the privacy to which every lawyer is entitled. Use of any evidence thus obtained has been held violative of the effective use of counsel guaranteed by the Sixth Amendment, United States Constitution.

Now, the Court has said that it is all right to use an informer where the electronic equipment would be illegal and improper. We, therefore, would have to question every stenographer that we might hire, or every chauffeur, or every carrier of legal papers, every investigator employed by us, even people who purport to be our friends and are present because we let them be present, and if perchance we wish to render an act of charity by employing someone who has stepped out of prison doors and who seeks a job, we would have to be fearful lest he be an agent of the F.B.I. or of the Attorney General or of the prosecuting offices, now approved by a majority of the Court.

Thus the Court has said that everyone who might be an informer, if present by consent of the informed, is eligible to turn on his employer or his best friend or his relative or his attorney or his client or his associate. He may legally and properly sell his soul and his best friend's liberty for a mess of potage. The Court has thus placed the status of an informer, taken out of jail or out of the penitentiary, as one who can not only profit financially but send the lawyer or the client or the friend to the penitentiary. In fact, the Court's opinion makes it profitable to do so.

In Germany during the Hitler regime, every child, it is said, was made an informer upon his parents and in totalitarian countries children have been instructed to

inform on their parents and on relatives. Heretofore, we have abhored such a situation in any administration, particularly in the administration of justice in America. The opinion of the Court now throws this door wide open and says it is O.K., prosecutors may do this with impunity, convicts may do this with profit, agents of the F.B.I. may do it with success and with the approbation of the Supreme Court of the United States.

But, should the defense try anything of the sort by placing an informer in the ranks of the prosecutor's office and use any such information, he will be charged with obstruction of justice and other crimes in the criminal code. If, perchance, a secretary of the Attorney General, or a Deputy Attorney General, is paid to leak information, not only obstruction of justice but bribery charges and other dire results would follow.

What, then, has happened to the motto on the Supreme Court Building: "Equal justice under the law?"

We, as defense attorneys, would have fear thrown into our hearts and denial of an opportunity to render fearless defense, to which every lawyer is pledged to give his very best regardless of the consequences to himself.

It is submitted that a rehearing should be granted in order that this Court may pass upon the issue as to whether such proceedings are authorized under the supervisory power of the federal courts in the administration of justice. We cannot believe that the opinion based upon this ground would be other than a reversal.

The members of this Court are big enough and important enough to reconsider the matter to determine what steps should properly be taken as to fair trial procedure.

Mr. Justice Clark stated in *Irvine v. California,* 347 US 128, 98 L.ed. 561, that if he was sitting in *Wolf v. Colorado,* 338 US 25, 93 L.ed. 1782, he would have rendered a different decision. Later, he did render a different decision in *Mapp v. Ohio,* 367 US 643, 6 L.ed. 2d 1081.

Mr. Justice Douglas has always been ready to defend against police methods which are abhorrent to society. Certainly, these procedures would be.

In *Osborn v. United States,* 17 L.ed.2d 394, at 409, Mr. Justice Douglas states:

> "One who invites or admits an old 'friend' takes, I think, the risk that the 'friend' will tattle and disclose confidences or that the Government will wheedle them out of him. The case for me, however, is different when government plays an ignoble role of 'planting' an agent in one's living room or uses fraud and deception in getting him there. These practices are at war with the constitutional standards of privacy which are parts of our choicest tradition.
>
> "The formula approved today by the Court in Hoffa v United States, — US —, 17 L ed 2d 374, 87 S Ct —, makes it possible for the Government to use willy-nilly, son against father, cousin against uncle, friend against friend, to undermine the sanctity of the most private and confidential of all con-

versations. The Court takes the position that whether or not the Government 'placed' Partin in Hoffa's councils is immaterial. The question of whether the Government planted Partin or whether Hoffa was merely the victim of misplaced confidence is dismissed as a 'verbal controversy . . . unnecessary to a decision of the constitutional issues.' Hoffa v United States, — US —, 17 L ed 2d 374, 87 S Ct —. But, very real differences underlie the 'verbal controversy.' As I have said, a person may take the risk that a friend will turn on him and report to the police. But that is far different from the Government's 'planting' a friend in a person's entourage so that he can secure incriminating evidence. In the one case, the Government has merely been the willing recipient of information supplied by a fickle friend. In the other, the Government has actively encouraged and participated in a breach of privacy by sending in an undercover agent. If Gouled is to be followed, then the Government unlawfully enters a man's home when its agent crawls through a window, breaks down a door, enters surreptitiously, or, as alleged here, gets in by trickery and fraud. I therefore do not join in the Hoffa opinion."

A "friend" who comes to our house by invitation but who steals our silverware or our money or even our private thoughts, is still a thief and should be treated as such. He is not entitled to immunity because he succeeded in entering into our home or our confidences, nor should he be allowed to use anything he stole at any future time.

Here, Partin clearly entered by fraud and deception. At all times he was an undisclosed government agent.

Surprisingly, the learned Justice Douglas, with his tremendous argument in favor of public policy protecting one's privacy, would join in a dismissal because of a lower court's "finding" that Partin was not placed in the defendant's midst by the government. Partin was admittedly not an ordinary invitee. He was there by fraud and deception under Government pay and approval. One must indeed wear blinders to overlook the undisputed evidence that Partin wheedled himself out of a Louisiana jail under indictment for state and federal crimes, including embezzlement, kidnaping, manslaughter, perjury, assault, and income tax violations, got on the government's payroll and worked under the specific directions of Walter Sheridan, the civilian employee in the Department of Justice specifically assigned to conduct the vendetta against Hoffa.

Surely, if *Gouled v. United States* is to be followed (255 US 298, 65 L.ed. 647), then however Partin obtained his entrance was fraudulent and "at war with the constitutional standards of privacy which are part of our choicest traditions" (quoting Justice Douglas in *Osborn v. United States,* supra).

The decision is also at war with the learned opinion of Mr. Justice Potter Stewart in *Massiah v. United States,* 377 US 201, 12 L.ed.2d 246, where the Court, dealing with Sixth Amendment rights, held that "Massiah was more seriously imposed upon . . . . because he did not even know that he was under interrogation by a government agent." (377 US 206, 12 L.ed.2d 250)

The decision of the Court is at war with much of the quoted language of *Massiah v. United States* wherein the Court said:

> "Ever since this Court's decision in the Spano case, the New York courts have unequivocally followed this constitutional rule. 'Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.' People v Waterman, 9 NY2d 561, 565, 175 NE2d 445, 448."

We respectfully submit that Justice Douglas's presentation of what public policy and constitutional rights require should be the law, but reaches a mistaken conclusion as to dismissing the case rather than reviewing it. We respectfully submit that Justice Douglas's splendid dissenting opinion in *Osborn v. United States,* 17 L.ed.2d 394, should be a part of a majority opinion reversing the judgment in this case.

Whether Partin was there by invitation or otherwise becomes immaterial if he was a government agent, secretly questioning or getting statements from Hoffa to be used in a trial against Hoffa without the presence of counsel, and without Hoffa's knowledge, then or later.

Further, in *Massiah v. United States,* 377 US at 205-206, 12 L.ed.2d 250, Mr. Justice Stewart said:

> "Here we deal not with a state court conviction, but with a federal case, where the specific guarantee

of the Sixth Amendment directly applies. Johnson v Zerbst, 304 US 458, 82 L ed 1461, 58 S Ct 1019, 146 ALR 357. We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. It is true that in the Spano case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.' 307 F2d at 72-73."

In *Irvine v. California*, 347 US 128, 98 L.ed. 561, a majority of the Court even recommended prosecution of the officers for conduct far less horrible than that exemplified by the record in this case.

In *Irvine*, the officers planted a dictaphone in a man's home to gather information, not for the case that was going on but for bookmaking that would take place in the future, just as in this case they planted the human "bug", the informer, in the ranks of Hoffa and his associates, not to gather evidence of the alleged crime that had occurred but in the hope of being able to get something that would "get" him and destroy him.

Thus, we think that Justice Douglas should also join in seeking a rehearing in the fair administration of justice against such police methods.

We think that Chief Justice Warren has completely answered the argument advanced by Justice Clark and Justice Douglas as to the matters involved since constitutional issues have always been not only subject to review by this Court but this Court can make its own examination of the record to determine if constitutional rights have been violated and if they have, to reverse the judgment.

Lisenba v. California, 314 US 219, 86 L.ed. 166

Stewart v. United States, 366 US 1, 6 L.ed.2d 84

Griffin v. California, 380 US 609, 14 L.ed.2d 106

Napue v. Illinois,
360 US 264, 271, 3 L.ed.2d 1217, 1222

Jacobellis v. Ohio,
378 US 184, 12 L.ed.2d 793 (1964)

Haynes v. Washington,
373 US 503, 10 L.ed.2d 513 (1963)

Watts v. Indiana, 338 US 49, 93 L.ed. 1801 (1949)

Hooven & Allison v. Evatt,
324 US 652, 89 L.ed. 1252 (1945)

Norris v. Alabama,
294 US 587, 79 L.ed. 1074 (1935)

This Court has never hesitated to review the evidence to determine if a constitutional right has been violated and to reverse the judgment thereon.

As to the violations of constitutional rights which are passed upon by the Supreme Court, we respectfully urge reconsideration as to each of the three grounds, to-wit: violations of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

Taking the first point, as to the violation of the Fourth Amendment:

The majority opinion of the Court concedes that Hoffa's home and surrounding areas, his room and his automobile, were protected by the Fourth Amendment from "unwarranted governmental intrusion and when he put something in his filing cabinet, in his desk drawer or in his pocket, he has a right to know it will be secure from an unreasonable search or an unreasonable seizure." (17 L.ed.2d 374, 381, 382)

The Court, however, says that the petitioner was not relying on the security of his hotel suite when he made incriminating statements to Partin or in Partin's presence. It says Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. The majority says Partin was in the suite by invitation and every conversation which he heard was either directed to him or knowingly carried on in his presence.

The fallacy of this argument is that Partin was in the hotel suite as a secret *government agent*. He had entered the suite by fraud, pretending to be what he was not and purposefully he was there as a surreptitious eavesdropper in his fraudulent disguise.

To say that he was there by invitation and therefore was authorized to steal the secrets of Hoffa's position in

the hotel and in surrounding circumstances, is to say that a thief may enter the suite. Of course, the evidence discloses that the solicitation to be invited came from the government agent, who did not disclose his identity.

In *Lisenba v. California,* 314 US 219, 86 L.ed. 166, the Court said:

> "If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured and used in the trial."

It has always been said from early days in our administration of law that fraud vitiates everything.

Partin was present like a wolf in sheep's clothing. Fraud has always been the basis of both civil and criminal judgments and neither in law nor in equity has any fraudulent conduct been allowed to stand. Fraud and deceit have been the basis of tort actions since 1789. (*Pasley v. Freeman,* 3 Term Rep. 51, 100 Eng. Rep. 450 (1789); *Peek v. Deery,* 14 App. Cas. 337, 369 (1889))

It has been held that ambiguous statements capable of two meanings, one of which is true and the other false, constitute misrepresentation if the false meaning is understood as the true one and if this is the result intended, it is fraudulent.

"Indeed, as a question of cauistry", observed Lord Blackburn in Smith v. Chadwick, 9 App. Cas. 187 (1884), "the fraud is aggravated by a shabby attempt to

get the benefit of a fraud without incurring any responsibility. Thus if the misapprehension of the plaintiff is one to which the defendant has contributed by ambiguous statements or otherwise there has been a misrepresentation which, if acted upon and if so intended is actionable."

Smulson v. Board of Dental Examiners, 47 Cal. App.2d 584, 118 P.2d 483 (1941)

Rand v. Mitcham, 122 Me. 65, 118 A. 893 (1922)

37 C.J.S. Fraud, Sec. 176

Likewise, representations literally true but creating a false impression in the mind of the hearer may constitute false representation. One may be guilty of a misrepresentation in law, as well as in morals, by purposely creating a false impression or belief in the mind of another with the intention that he act upon it without making any positive or literal false statement of fact.

Welborn v. Cobb, 92 S.Car. 384, 393, 75 S.W. 691

A fraud, said the Georgia court, may be as effectually perpetrated by telling the truth as a falsehood, by calling things by their right names as by their wrong names.

Mulligan v. Bailey, 28 Ga. 507, 510 (1859)

A person is not permitted to profit by the fault of another.

Scott on Trusts, Sec. 469, p. 3130

Neither should the government.

Various federal statutes make use of fraud or fraudulent schemes or artifices felonies and as against public

policy. These include mail fraud (Title 18, Section 1341); fraud in impersonations; fraud by wire or telephone; false reports and many other types of fraud which are forbidden by federal law.

Under the mail fraud statute, a statement or representation is fraudulent if known to be untrue and made or caused to be made with the intent to deceive.

Parr v. United States, 363 US 370, 4 L.ed.2d 1277

United States v. New South Farm & Home Co., 241 US 54

It cannot be doubted that Partin's representation of himself was fraudulent and made with the intent to deceive Hoffa and his attorneys and associates. We respectfully submit that public policy should forbid the government from using this type of tainted information.

We also respectfully submit that the mere fact that Partin was permitted to enter the suite other than by force or stealth did not change his character of having entered into it by fraud and deceit and that in this position, the use of such information as he gathered was stolen as much as if he had dipped into Hoffa's pocket and had taken out money or other things of value. Indeed, the information he took was apparently more valuable than anything else.

If this was a case involving business secrets, would not equity restrain the use of those secrets to prevent their being turned over to someone else, including the government.

Equity has long protected things of the mind such as common law copyright, intangible ideas, patents and

other copyrights, trade marks and secondary meanings and trade secrets. It has constantly been held that an employee will be restrained from revealing to a third party any secret formulas, customers' lists or any special knowledge which he acquired, regardless of whether he is permitted to be on the premises and is even employed by the person whose secrets he attempts to steal or sell.

Thus, we think that a reexamination of Partin's actual status will reveal that he was there in violation of rights secured by the Fourth Amendment and the Court should reconsider his status in the light of the fraud that he was committing.

The Fifth Amendment rights, it is claimed, stem from Partin's testimony, again, as to whether his presence was solely voluntary. Regardless of whether it was voluntary, it was fraudulent and under the doctrine of *Lisenba v. California,* 314 US 219, 86 L.ed. 166, any statements which are megaphoned from Hoffa through Partin are protected from use under the Fifth Amendment to the Constitution of the United States. We respectfully submit that the case is similar to that of *Massiah v. United States,* 377 US 201, 12 L.ed.2d 246, but Hoffa is in a stronger position.

Likewise, the Court should re-examine the attorney-client privilege in connection with its decision. It is immaterial what part of the relationship Partin was present. It is not the quantity of the poison which his presence injects into the flow of the stream, but whether there is any in it. Once the flow is tainted, we submit that it must necessarily follow that protection of the attorney-client relationship demands that his testimony be suppressed.

In respect to the violation of the constitutional rights under the Sixth Amendment, the Court says:

> "The proposition that a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment has found expression in two cases decided by the Court of Appeals for the District of Columbia, Caldwell v. United States, 205 F.2d 879, and Coplon v. United States, 191 F.2d 749 . . . We may assume that the Coplon cases were rightly decided and further assume, without deciding that the government's activities during the Test Fleet trial were sufficiently similar to what went on in Coplon and Caldwell to invoke the rule of those decisions. Consequently if the Test Fleet trial resulted in a conviction instead of a hung jury the conviction would presumptively have been set aside as constitutionally defective. Black v. United States, 17 L.ed.2d 26, 87 S.Ct. 190.
>
> "But a holding that it follows from this presumption that the petitioner's conviction in the present case should be set aside would be both unprecedented and irrational."

The Court holds that the trial in which it occurs would be invalidated but not a subsequent trial. We respectfully ask the Court to rehear this determination as this, in effect, holds that a thief who steals knowledge or information cannot use it originally but if he passes it on to someone else it becomes valid. We think such a holding is unprecedented and irrational, both in law and in equity.

Where one obtains property by fraud and converts it or sells it, it can be followed through the various sources to which it may be transferred or to which it goes. The party who receives fraudulent or stolen goods gets no better title to it than the thief himself. One who steals an automobile and transfers it to another state and sells it in another state does not pass good title in the second transfer.

Nor to respectfully hold that because the knowledge or information or actions thus, in the first trial, were invalid that because they occur in a second proceeding they became validated. In fact, in *Irvine v. California,* 347 US 128, 98 L.ed. 561, the object of putting the electronic equipment in the bedroom of Irvine was to get information regarding future bookmaking, and in *Furnish v. California,* 16 L.ed.2d 1017 (236 Cal. App. 2d 807), this Court denied a right to use the information illegally gotten in the second or later proceeding.

Evidence obtained by wiretapping would not be admissible if obtained in the first, second or any trial as it was obtained against the law and contrary to public policy and contrary to statute. Hence, if, as this Court says, it may presume that if it was attempted to be used in the Test Fleet trial it would be illegal and would be reversed on the authority of *Black v. United States,* 17 L.ed.2d 26. We respectfully submit that to use it in a later trial has not removed its infirmity.

It is not the charge that must be the test, but the basis of obtaining information in violation of the constitutional right and once that information is obtained in violation of the constitutional right, it is tainted, polluted

and inadmissible under constitutional standards. It matters not what the offense was, it is what the method of obtaining it was that surely must be the test. In the *Caldwell* case, the Court recognized that a subsequent trial could be unfair to the accused. (205 F.2d 879, 881, 882)

An informer must be in the same position as to his credibility as an accomplice. Many states require corroboration of an accomplice before his testimony will be accepted.

People v. Braun, 31 Cal.App.2d 593, 88 P.2d 728

Surely an informer or an accomplice, one who is paid by the government not only in liberty and freedom from serious crimes but in money as well, should not have the credibility and standing of one not so tainted. Public policy forbids this.

When a party produces a witness, he vouches for his credibility. And when the government puts its weight behind a witness such as Partin, it adds massively to his credibility. The jury in this case was not told that the fact that the government had produced Partin did not mean that they were vouching for his credibility. In fact, the government's argument was that this accused jailbird, charged with federal crimes, was telling the truth and the whole truth and should be believed by the jury. If the government was prosecuting Partin for the crimes with which he was charged, the prosecutor surely would tell the jury that they could not believe a word Partin said, but since he became a government witness, the courts below and now this Court should take his words

as truthful expressions. This is shocking in the administration of justice.

We believe that this Court, in its administration of justice, should not hesitate to re-examine a case of such major importance to determine whether its first judgment is erroneous and to grant a rehearing and order the indictment dismissed.

> *Zap v. United States,* 328 US 624, 90 L.ed. 1477, reh. den. 329 US 824, 91 L.ed. 780, reh. granted and case reversed 330 US 800, 91 L.ed. 1259

The Criminal Courts Bar Association of Los Angeles County, which seeks to protect and uphold the high standards which all attorneys must observe in the administration of justice, was indeed shocked to find that this Court upheld a procedure not wholly delineated in the majority opinion of the Court and a reliance for credibility upon a person who was, as the opinion shows, without question, taken out of jail, his bond reduced from $50,000 to $5,000 and a series of criminal charges against him: embezzlement (dishonesty), kidnapping, personal injury, tax evasion (deceit of the government), would be accepted by the majority of the Court as a credible witness and his testimony footnoted in support of the Court's opinion with the strength of credibility of the Holy Writ.

In the ordinary parlance of the criminal courts, such a witness is an unreliable and dishonest one whose testimony is deemed to be inherently improbable. Such a witness if not totally discarded has generally required corroboration.

It is the general rule that a witness is a discredited witness whose general reputation for truth, honesty or integrity is bad. Who could put Partin's reputation in any other category?

Furthermore, the testimony of informers has always been subject to question.

On Lee v. United States, 343 US 747, 757, 96 L.ed. 1270

Proffit v. United States, 316 F.2d 705

Roviaro v. United States, 353 US 53, 1 L.ed.2d 639 at 644, wherein the Court held that the defense is entitled to know the identity of persons who furnish information of violations of law and who are informers.

Scher v. United States, 305 US 251, 254, 83 L.ed. 151

Re Quarles, 158 US 532, 39 L.ed. 1080

Vogel v. Gruaz, 110 US 311, 316, 28 L.ed. 158

In the *Roviaro case,* 353 US 53, 1 L.ed.2d 639, the government's informer was the sole participant in the alleged transaction. Here, Partin was also practically the sole participant, but pretended to act in a capacity not to discover crime that was actually occurring but one which, it was hoped, would occur. What the opinion fails to disclose is that the government had employed a layman, Walter Sheridan, and had 47 F.B.I. agents in and around the trial. What it also failed to disclose is that Sheridan had made arrangements with Partin to act as a faithful government servant in the defense camps.

If Partin had been a non-communicative electronic device that could only repeat what was on tape (which would at least be more accurate in its repetition than a human recorder), this Court would have rejected such a device in the camps of the defendant, in his hotel or among his attorneys. Evidence from a human "bugging device", which moved with petitioner wherever he went, should have made it of a character requiring its suppression. This Court should, in its supervisory power in the administration of justice, so hold.

The majority opinion approves a one-way street for the administration of justice — that is, that it is all right for the prosecution to plant an informer in the ranks of defendants and their counsel, not to discover any crime that is actually committed but to infiltrate into lawyers' offices and their defendants "to see if crimes would in the future be committed and to obtain dubious evidence by paying an enormous price for it." This is like a Judas goat, where they send an animal to attract other animals for the purpose of leading them to slaughter.

But, if a defendant even began to seek out secrets from the prosecution or to use a government stenographer as an informer or to send someone in to get a job so that he or she could inform the defense of the prosecution's plan and scheme and to pay *any* price, not an enormous price, for such information, there would be conspiracy charges galore of obstructing justice and bribery, and this Court would sustain a prosecution on that basis.

Is this really even handed justice? We most strongly urge this Court to re-evaluate its opinion in its supervisory power in the administration of justice. We believe the members of this Court who voted for affirmance

should and would, upon a re-evaluation, reconsider their former position.

Actually, Section 1503 of Title 18 makes it a felony to corruptly or by threats or force or by any threatening letter or communication to endeavor to influence, intimidate or impede any witness in any courts of the United States. Title 18, Chapter 73, provides penalties for obstructing justice by influencing witnesses generally. Surely the conduct of the agents of the government is just as subject to the criticism of obstructing justice, in this case, far more so than the defendant who is being prosecuted.

Although the Court granted certiorari limited to one question, the issues in this case are much broader. The list of violations of procedural due process guaranteed by the Fifth Amendment to the Constitution were bypassed in the first application for the writ of certiorari.

Although the defendant was charged with being an aider and abettor of his co-defendants, under Title 18, Sections 2 and 1503, he was charged with violation of Section 2(a) of Title 18 but was tried for a violation of Section 2(b), while his co-defendants were charged and tried for a violation of Section 2(a) of Title 18. This was a denial of procedural due process guaranteed by the Fifth Amendment, for although his co-defendants were charged with and tried for one section, he, on the other hand, was tried on another and this is contrary to the holding of this Court in *Cole v. Arkansas*, 333 US 196.

A search of the entire record will fail to show where this principal defendant, James R. Hoffa, at any time made any offer to corrupt or influence prospective juror

Grattan Fields (Count 3) or that he at any time did meet with Carl Fields, a son of Grattan Fields, and did offer and promise Carl Fields a sum of money for the purpose of causing Carl Fields to influence Grattan Fields to vote for acquittal.

Count 5 also fails to show where James R. Hoffa at any time did endeavor to influence, intimidate or impede Mrs. James R. Paschal, a petit juror in the trial, or that he at any time offered assistance in getting James R. Paschal a promotion in the Tennessee State Highway Patrol. Not even Partin testified to any such specific acts as connect him with these two counts, or either of them.

The government apparently was hard put to "get" Hoffa, resorting as it did to the tactics that here shock our concept of justice.

One of the most abhorrent things in the trial was the bringing in of a transcript of proceedings in chambers in the Test Fleet case regarding the excusing of prospective jurors and allowing it to be read to the jurors in this case, with no right of cross-examination. This certainly was contrary to another opinion handed down by this Court in *Parker v. Gladdin,* No. 81, October Term 1966, 35 Law Week 4097, since Hoffa was denied the right of cross-examination of the document read and presented to the jury.

Since Partin was a discredited witness with an entirely corrupt and criminal background and since his testimony was bought and paid for by the government, his testimony must be deemed to have been inherently improbable and incredible, leaving only one set of facts to be believed and uncontradicted. Therefore, the Court

was not asked to review concurrent findings of fact but to accept the uncontradicted facts of a highly reputable businessman at the head of an organization having more than a million members. We know of no greater comparative analysis as to any permissible views under these circumstances. The only permissible view is that of the credible witness.

What would the government have argued had Partin been called as a defense witness? What would any member of this Court think if Partin was called on any important question on which the personal affairs of a member of this Court were involved?

The writ of error, instead of being improvidently granted, we submit was improvidently limited to the one question, whereas the Court should now, in its supervisory capacity over criminal justice re-open the case to examine all of the questions raised on the petition for writ of certiorari and particularly the question as to whether this important defendant has received fair trial.

This Court, in its supervisory position, must now take cognizance of this situation.

Your petitioner, the Criminal Courts Bar Association of Los Angeles County, as amicus curiae, respectfully urges the Court to grant a rehearing upon the following grounds, to-wit:

1. The majority opinion misinterprets the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

2. That the majority opinion of the Court shocks the conscience in the fair administration of justice and

fair play due to a defendant in a criminal case and is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

3. The Court should reconsider the entire case in the light of its supervisory power in the fair and just administration of even-handed justice.

4. The Court should grant a rehearing in order to reconsider all of the points presented on the original petition for certiorari, particularly the point that the defendant was convicted without due process of law in that the indictment charged him with one offense and he was tried on another with which he was not charged.

5. The Court should examine into evidence of wire tapping and its use by the government in this case.

6. The Court should adopt the opinion of Chief Justice Warren as the opinion of the Court.

WHEREFORE, the Criminal Courts Bar Association of Los Angeles County respectfully prays that this Honorable Court grant rehearing of its decision and that it further reexamine the entire case under its supervisory power of criminal justice and to determine whether the defendant has had a fair trial, and stands justly convicted on the specific charges in the indictment.

Respectfully submitted,

Criminal Courts Bar Association
of Los Angeles County

By MORRIS LAVINE, ESQ.

Its Attorney

CERTIFICATE OF COUNSEL

Morris Lavine, counsel of record for the Criminal Courts Bar Association of Los Angeles County, certifies that the above brief in support of the petition for rehearing is filed in good faith and not for the purpose of delay, and is based on matters contained in the Court's decision of December 12, 1966.

MORRIS LAVINE